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Before the
Federal Communications Commission
Washington, D.C. 20554

FCC 04M-31
03713

In The Matter of) MB Docket No. 04-191
)
San Francisco Unified School District)
)
For Renewal of License for Station) Facility ID No. 58830
KALW(FM), San Francisco, California) File No. BRED-19970801 YA
)

MEMORANDUM OPINION AND ORDER

Issued: October 7, 2004

Released: October 8, 2004

Background

1. This is a ruling on Motion to Enlarge the Issues ("Motion") filed by San Francisco Unified School District ("SFUSD") on September 7, 2004. The Enforcement Bureau ("Bureau") Opposition to Motion to Enlarge the Issues ("Opposition") was filed on September 21, 2004. SFUSD filed its Reply in Support of SFUSD's Motion to Enlarge the Issues ("Reply") on October 4, 2004.

2. SFUSD seeks to add a new issue:

To determine whether station KALW(FM) has provided meritorious service during the license period justifying renewal of SFUSD's license.

3. In the *HDO*,¹ the Commission alleged the following issues for full evidentiary hearing:

- (1) To determine whether San Francisco Unified School District falsely certified its application with respect to the completeness of the KALW(FM) public inspection file and the effect thereof on its qualifications to be a Commission licensee.

¹ *In re San Francisco Unified School District for Renewal of License for Station KALW(FM), San Francisco, California, Hearing Designation Order and Notice of Apparent Liability for Forfeiture*, FCC 04-114, released July 16, 2004 (the "*HDO*").

- (2) To determine whether San Francisco Unified School District made misrepresentations of fact or was lacking in candor and/or violated Section 73.1015 of the Commission's Rules with regard to its certification in the subject license renewal application that it had placed in the KALW(FM) public inspection file at the appropriate times the documentation required by Section 73.3527, and the effect thereof on its qualifications to be a Commission licensee.
- (3) To determine, in light of the evidence adduced pursuant to the specified issues, if the captioned application for renewal of license for station KALW(FM) should be granted.

Arguments

4. SFUSD argues that a meritorious service issue (1) is relevant to consideration of the merits of renewal, and/or (2) would provide mitigating evidence relevant to some or all of the aforesaid issues set under the *HDO*.

5. The Bureau argues that the issues under the *HDO* relate to allegations of false certification and representation and that depending on findings of these basic qualifying issues, SFUSD's license will be renewed or renewal will be denied. The Bureau argues that in either event, evidence of meritorious service would be irrelevant. But the Bureau does not argue total irrelevance of meritorious service in considering whether forfeiture is appropriate, and what would be the appropriate forfeiture amount. The Bureau argues, however, that the forfeiture statute [47 U.S.C. § 503] does not require consideration of service programming over a period of thirteen years. The Bureau also recognizes that circumstances surrounding the violation and the violator are an appropriate evidentiary focus.

6. There are two key cases relied on by the parties: *Arkansas Educational Television Commission*, 6 F.C.C. Rcd 478 (1991) ("*Arkansas*"); and *In re Application of KQED, Inc.*, 3 F.C.C. Rcd 2601 (Review Board 1988) ("*KQED*").

7. *Arkansas* is relied on by SFUSD as authority for the allowance of meritorious service evidence. In that case, a renewal applicant's public files were out of order when it certified its renewal application. The Commission found that the renewal applicant actually had kept its issues/programs lists out of order. The fact that the lists were in fact maintained negated the intent to misrepresent, or to violate the Commission's rules. See 6 F.C.C. Rcd at 478, Para. 5. The Commission also found that while the applicant had failed in its ascertainment of community interests, "substantial efforts" had been made to become aware of community issues. *Id.* at 480, Paras. 12-13. In order to reach this conclusion, the Commission "thoroughly reviewed" the programming and concluded on the merits that the renewal applicant had met programming obligations. *Id.* at 481, Para. 13.

8. *KQED* is relied on by the Bureau as authority for not considering meritorious service evidence in a renewal hearing. In *KQED*, the renewal licensee was found to have misrepresented through disclosures that were “affirmatively misleading”, that went beyond not merely “failing to state the full facts”. See 3 F.C.C. Rcd 2608-2609, Para. 35. *KQED* had misrepresented equipment problems during the period of a darkening, perhaps the worst mishap for a broadcast licensee entrusted with the public’s spectrum. In addition, there were “vital financial considerations” that were deliberately not reported and that had caused Station *KQED* to go off-the-air. *Id.* The Review Board held that the Presiding Judge had erred in permitting evidence of meritorious programming in mitigation of *KQED*’s intentional misrepresentations. *Id.* at 2607, Para. 27. Yet it was also held that *KQED*’s misrepresentations were not so pervasive as to warrant denying renewals of two associated broadcast facilities. *Id.* at 2608, Para. 34. There was no forfeiture issue in the *KQED* case.

9. The Bureau also asks that SFUSD’s new issue be rejected as “facially deficient” because the Motion lacks specific allegation of fact under affidavit. See 47 C.F.R. § 1.299(d). But there are no substantial questions of fact at issue that underlie the request for meritorious service issue. The issue gets added or rejected based on the law and Commission policy. Here there are no substantial facts relating to meritorious service that are factually in contention.

Discussion

10. Where there is a challenged license renewal, it is important to consider all relevant evidence relating to the issues set in the *HDO*. See *Character Policy Statement*, 102 F.C.C. 2d 1179, 1210-1211 (1986) (Commission has broad discretion in choice of remedies and sanctions for misrepresentations and will consider all facts of a given case). The holding on mitigation by the Review Board went to evidence of service relating to the violation, and not to the sanction or remedy:

[I]t was error for the ALJ to permit programming evidence in mitigation of *KQED*’s intentional misrepresentations.

3 F.C.C. Rcd at 2607, Para. 27. But *KQED* did not lose all of its outlets. While the misrepresentation in *KQED* was “affirmatively misleading” and “deceitful conduct” warranting denial of a renewal of one station, the misrepresentation was “isolated” and not so “pervasive” as to warrant denial of the renewal of two associated broadcast licenses. *Id.* at Paras. 35-36. Therefore, *KQED* was permitted to salvage two of its three broadcast outlets, notwithstanding a serious misrepresentation concerning a station blackout. There the Review Board held that meritorious service of the one offending station was irrelevant to the other two. Here it is SFUSD’s only broadcast outlet that is at stake, and SFUSD faces a stiff forfeiture. Therefore, SFUSD, as the party carrying the burdens of proof, must be permitted to make its case fully and completely.

11. The appropriateness of permitting meritorious service evidence where there are basic qualifying issues involves different considerations depending on circumstances. The Commission has held:

When character qualifications are in question, the Commission may consider mitigating evidence under the theory that the public interest is better served if the Commission's evaluation of the applicant's fitness to continue as licensee includes consideration of favorable traits of the licensee as well as his deficiencies.²

Cosmopolitan Broadcasting Corp., 75 F.C.C. 2d 423, 425 (1980). Thus, the appropriateness of considering meritorious service in a renewal proceeding where character is in issue necessarily depends on the nature of the alleged disqualification. The Commission has held:

Some forms of misconduct (e.g., misrepresentation, bribery, fraudulent billing) are *prima facie* so serious, however, that a grant would not be in the public interest no matter how meritorious the applicant's past programming record, and in such cases the Commission will not even consider programming evidence as a mitigating factor.³

Cosmopolitan Broadcasting Corp., *supra* at 425 n. 3. But compare *In re Application of Norjud Broadcasting, Inc.*, 55 F.C.C. 2d 808 (Review Bd. 1975); *In re Application of White Mountain Broadcasting Co.*, 54 F.C.C. 2d 299 (1975) (issue of meritorious service properly added but not to be considered under a specified misrepresentation issue).

12. The Commission's policy on "mitigating factors" when "drawing conclusions regarding the treatment of misrepresentation" recognizes that "the choice of remedies and sanctions is an area in which we have broad discretion." *Statement on Character Qualification*, *supra* at 1210-1211. While the policy still adheres to the proposition that meritorious service may not be considered in determining (or in mitigating) any misrepresentation that is accompanied by an intent to deceive, meritorious service may be considered in determining other non-deception issues that are litigated in the same case. In that regard, SFUSD asserts in its Reply that issues set in the *HDO* "are

² Citing *Wagoner Radio Co.*, 12 F.C.C. 2d 978 (Review Bd. 1968); *KFPW Broadcasting Co.*, 4 F.C.C. 2d 126 (1973).

³ Citing *Immaculate Congregation Church of L.A. v. F.C.C.*, 320 F. 2d 795 (D.C. Cir. 1963); *United Broadcasting Co. of Florida, Inc.*, 60 F.C.C. 2d 816 (1976); *KFPW Broadcasting Co.*, 40 F.C.C. 2d 126 (1973); *Westar Communications, Inc.*, 41 F.C.C. 2d 581 (Review Bd. 1973).

not limited to the issue of intentional misrepresentation.” SFUSD offers the alternative that the evidence may show that there was no intent to deceive, or that there may have been a mistaken understanding of fact and/or law with respect to the public inspection file. But that argument merely puts to one side the clear language of the issues set against SFUSD on misrepresentation, for which the burdens of proceeding and proof were assigned to SFUSD. *See HDO*, Para. 29. If SFUSD is found to have intentionally misrepresented its public files to the public and has made related false filings with the Commission, then renewal may not be granted regardless of programming. But if the preponderance of the evidence presented fails to support a conclusion of intent to deceive, then the denial of a renewal would not be appropriate.⁴

Forfeiture

13. There is a forfeiture issue set against SFUSD at Para. 25 of the *HDO*.⁵

[I]rrespective of whether the hearing record warrants an Order denying the renewal application for KALW(FM), it shall be determined, pursuant to Section 503(b)(1) of the Communications Act of 1934,⁶ whether an ORDER OF FORFEITURE in an amount not to exceed \$300,000 shall be issued against SFUSD for willful and/or repeated violations of Sections 73.1015, 73.3527, and/or 73.3613 of the Commission’s Rules,⁷ which occurred or continued within the applicable statute of limitations.

⁴ Also, it is noted that this is not a “comparative case.” Therefore, there is no competing application to consider which might involve an issue of renewal expectancy based on meritorious service as a favorable comparative factor. *Compare Cowles Broadcasting, Inc.*, 86 F.C.C. 2d 993, 1043 (1981), *aff’d sub nom.; Central Florida Enterprise, Inc. v. F.C.C.*, 683 F.2d 503 (D.C. Cir. 1982) (claim of “renewal expectancy” based on past performance rejected by Commission in view of serious adverse character violations).

⁵ The burden of proceeding on the forfeiture issue is assigned to the Bureau, but the burden of proof is assigned to SFUSD. *See HDO*, Para. 29.

⁶ 47 U.S.C. § 503(b)(1).

⁷ 47 C.F.R. §§ 73.1015, 73.3527, and 73.3613.

The forfeiture statute and regulation both provide for mitigating evidence:

In determining the amount of such a forfeiture penalty, the Commission or its designee shall take into account the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, and history of prior offences, ability to pay, *and such other matters as justice may require.* [Emphasis added.]

47 U.S.C. § 503(a)(1)(D) and 47 C.F.R. § 1.80(b)(4). The inclusion of a forfeiture issue in the *HDO*, which was discretionary, justifies receipt of evidence in mitigation and SFUSD will be permitted to make a reasonable showing of meritorious service. Receipt of such evidence is consistent with the forfeiture statute and the Commission's rule on forfeiture which provide specifically for considering "such other matters as justice may require." *Id.* Furthermore, the Commission's forfeiture rule specifies mitigation as discretionary for reducing a forfeiture. 47 C.F.R. § 1.80(h)(i).

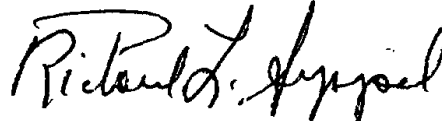
14. There is no decided case cited by either party in which meritorious service was a factor in determining the amount of forfeiture. The Bureau argues that the Act does not require consideration of meritorious programming "over a more than 13-year span." But the Bureau cites no authority precluding a limited amount of potentially mitigating evidence in connection with a forfeiture issue that is set against a renewal applicant.

15. Under the circumstances, SFUSD will be permitted to introduce evidence on meritorious service. But such evidence will be limited in scope to one year of programming prior to the filing of the petition to deny (**November 3, 1996 to November 3, 1997**), and one year of programming prior to release of the *HDO* (**July 16, 2003 to July 16, 2004**).

Order

Accordingly, in accordance with the rulings above, IT IS ORDERED that the Motion to Enlarge the Issues filed by San Francisco Unified School District on September 7, 2004, IS DENIED in part and IS GRANTED in part.

FEDERAL COMMUNICATIONS COMMISSION⁸



Richard L. Sippel
Chief Administrative Law Judge

⁸ Courtesy copies of this *Order* were transmitted to counsel for each of the parties by e-mail on the date of issuance.